Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

DR. K, et al.,
Petitioner,

v.

STATE BOARD OF PHYSICIAN
QUALITY ASSURANCE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

Petition for Writ of Certiorari

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QUESTION PRESENTED

DOES THE CONSTITUTIONAL RIGHT OF PRIVACY QUELL THE DISCLOSURE OF A PATIENT'S MENTAL HEALTH RECORDS TO THE BOARD OF PHYSICIAN QUALITY ASSURANCE WHICH IS INVESTIGATING A PATIENT'S PSYCHIATRIST WHEN THE PATIENT HAS NOT AUTHORIZED THE DISCLOSURE OR HAS NEVER MADE ANY COMPLAINT ABOUT THE PSYCHIATRIST?

LIST OF PARTIES

1. Petitioner, designated as Patient A for confidentiality reasons, was once the patient of Dr. K.

2. Dr. K. Not a party to this appeal, but was a party to the action below. Dr. K is a psychiatrist whose identity has been withheld for confidentiality reasons.

3. Respondent, the Board of Physician Quality Assurance for the State of Maryland. The Board is seeking access to Petitioner's records.

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No.

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Supreme Court of the United States

October Term, 1994

DR. K, et al.,
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STATE BOARD OF PHYSICIAN
QUALITY ASSURANCE,
Respondent.

Petition for Writ of Certiorari
to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Petitioner, Patient A, respectfully requests that this Court grant this Petition for Writ of Certiorari.

OPINION BELOW

Dr. K, et al. v. State Board of Physician Quality Assurance, 98 Md. App. 103, 632 A.2d 453 (1993), cert. denied, ___ Md. ___, ___ A.2d ___ (1994).

STATEMENT OF JURISDICTION

On March 9, 1994, the Court of Appeals of Maryland denied this Petitioner's Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the

laws. (Emphasis added.)

STATEMENT OF THE CASE

This case concerns whether a patient has the right to keep sacrosanct mental health records as maintained by a psychiatrist when that psychiatrist has been served with a subpoena duces tecum by the Board of Physician Quality Assurance of Maryland ("Board"). The Circuit Court for Montgomery County, Maryland ruled that the patient did not have such a right.

This case had its genesis in a subpoena duces tecum issued by the Board to Dr. K, a psychiatrist. Upon information and belief, as well as statements made at the oral argument on the original motion, the Board was investigating two complaints against Dr. K. The complaints alleged that information was received from Dr. K's then-wife --

whom Dr. K was in the process of divorcing -- that Dr. K was having a romantic relationship with a former patient and that Dr. K had alcohol and emotional problems. Upon these hearsay complaints, the Board issued the subpoena duces tecum for the records of Patient A -- the alleged former patient of Dr. K.

The subpoena duces tecum requested the mental health records of Patient A. Upon being served with this subpoena duces tecum, Dr. K requested authorization from Patient A to disclose the records. Patient A expressly refused to grant that authorization.

The Board, however, persisted in its attempt to obtain Patient A's records. As a result of this persistence and Patient A's non-authorization, Dr. K sought guidance from the Circuit Court for Montgomery County, Maryland on June 16,

1992. Guidance was requested via Dr. K's Motion for Protective Order or, in the Alternative, to Quash Subpoena Duces Tecum. On June 18, 1992, Judge Ruben of the Circuit Court for Montgomery County, Maryland granted Dr. K's motion and quashed the subpoena duces tecum. Due to the fact that the Board had not had an opportunity to respond to Dr. K's Motion, the Board filed a Motion to Rescind the June 18, 1992 Order. On July 17, 1992, Judge Ruben granted that Motion and likewise sealed this case.

Thereafter, the Board filed its opposition to Dr. K's Motion and Dr. K filed a response thereto. On November 19, 1992, a hearing was held on this matter before the Circuit Court for Montgomery County, Maryland which then took this matter sub curia. On November 24, 1992, the Circuit Court denied Dr. K's Motion.

The Circuit Court concomitantly stayed its Order provided Dr. K or Patient A noted an appeal to the Court of Special Appeals of Maryland.

Upon receipt of this Order, Patient A inquired as to whether constitutional rights could be asserted to protect the disclosure of the mental health records. Patient A was alerted that Md. Health-General Code Ann. Section 4-307(h)(4) provided for the assertion of such rights. Consequently, Patient A requested that such rights be asserted.

On or about December 22, 1992, Patient A had filed with the Circuit Court for Montgomery County, Maryland a motion to reconsider the November 24, 1992 disclosure order. That motion asserted Patient A's Federal Constitutional Privacy Right to those records and it was further contended that the Board had presented no

"compelling interest" for the disclosure of those records. On December 22, 1992, the Circuit Court for Montgomery County, Maryland denied Patient A's privacy assertion. Consequently, on December 24, 1992, Patient A and Dr. K noted an appeal to the Court of Special Appeals from the November 24, 1992 and December 22, 1992 Orders.

In a reported opinion, the Court of Special Appeals of Maryland affirmed the judgment of the Circuit Court for Montgomery County, Maryland. In so affirming, the Court of Special Appeals held "that Patient A [had] a constitutional right to privacy in Dr. K's records of her psychiatric treatment". 98 Md. App. 112, 632 A.2d at 457. Further, the Court of Special Appeals agreed with Patient A's representation that Dr. K's records "are, in fact, a mirror by which

one can gaze into the reflected mind of the patient...Patient A's essence of being - the conscious and subconscious mind - [is] ensconced within the records sought..." 98 Md. App. at 115, 632 A.2d at 459. While so recognizing the highly personal and private nature of these records so as to require strict scrutiny, the Court of Special Appeals of Maryland nevertheless found a compelling state interest and quelled Patient A's privacy rights. On March 9, 1994, the Court of Appeals for Maryland denied this Petitioner's Writ of Certiorari.

REASONS FOR GRANTING THIS PETITIONER'S WRIT OF CERTIORARI

I. INTRODUCTION

This case presents the classic example of an individual's right versus government. That is, the issue engendered by this case presents the struggle of the

rights of the individual vis-a-vis the state - an Antigonene struggle that has its genesis in the founding of earliest of civilizations in and around the fertile crescent of the Tigris and Euphrates, the city-state polis system of ancient Greece, the Republica of Rome, the American Revolution, and more recently the overthrow of Communism in favor of individual rights. For this case, Patient A stands in the role of Antigone herself, with the added protection not held by Sophocles' Antigone; to wit: the constitutionally protected right of privacy. It is this most important protection that must be exalted in this case so as to protect Patient A's mental health records from disclosure.

II. CONSTITUTIONAL RIGHT OF PRIVACY AND MENTAL HEALTH RECORDS

Although the Constitution of the United States does not explicitly mention any right of privacy, this Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy". Carey v. Population Services Intern., 431 U.S. 678, 684 (1977). It is indeed clear beyond peradventure that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of a government." Thornburgh v. American College of Obstetricians, 476 U.S. 747, 772 (1986). As stated by Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 478, (1928) "the right to be let alone" is "the right most valued by civilized man". This Constitutional right of privacy,

therefore, extends to "the individual interest in avoiding disclosure of personal matters". Whalen v. Roe, 429 U.S. 589, 599 (1977).

The content of the Constitutional right of privacy has remained largely undefined. This Court has, however, identified at least two strands of the privacy right.

> "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interest. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."

Whalen v. Roe, 429 U.S. at 598-600.

The issue of compulsive disclosure of mental health records implicates both strands.

In Whalen v. Roe, 429 U.S. 589 (1977), this Court implicitly expressed

the opinion that decisions regarding medical care fall within the realm of the right of privacy. 429 U.S. at 598-604. See also, Plante v. Gonzales, 575 F.2d 1119, 1131 (5th Cir. 1978). An individual's decision whether to seek the aid of a psychiatrist, and whether to communicate certain personal information to that psychiatrist, falls squarely within the bounds of this "cluster of Constitutionally protected choices". Carey v. Population Services Intern., 431 U.S. at 685. In so falling within this "cluster of constitionally protected choices", this Court has been concerned with protecting individuals against governmental intrusion into matters affecting the most fundamental personal decisions and relationships. See, Id. at 686-692. The mental health records sought herein squarely fall within this protected

"cluster of constitutionally protected choices". This Petitioner explains.

No area could be more deserving of protection than communications between a psychiatrist and a patient. The nature of the psychotherapeutic process is such that disclosure to the therapist of the patient's most intimate emotions, fears, and fantasies is required. Many courts and commentators have concluded that because of the uniquely personal nature of mental and emotional therapy, accurate diagnosis and effective treatment require a patient's total willingness to reveal the most intimate of personal matters, a willingness that can only exist under conditions of the strictest confidentiality. See, Statement of the American Psychiatric Association before the Subcommittee on Government Information and Individual Rights, April 9, 1979;

Slovenko, "Psychiatry and a Second Look at the Medical Privilege", 6 Wayne L.Rev. 175 (1960); Guttmacher and Weinhofer, Psychiatry and the Law, 272 (1952); Caesar v. Mountanos, 542 F.2d 1064, 1067, (9th Cir. 1976, cert. denied, 430 U.S. 954 (1977); Lora v. Board of Education, 74 F.R.D. 565 (E.D.N.Y. 1977). The patient in psychotherapy knows that such revelations will be expected if the attempted cure is to be had. In laying bare one's entire self, however, the patient rightfully expects that such revelations will remain a matter of confidentiality exclusively between the patient and the therapist. Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976); In Re B, 482 Pa. 471, 394 A.2d 419 (1978); In Re Lifshutz, 2 Cal. 3d 415, 85 Cal Rptr. 829, 467 P.2d 557 (1970). Therefore, constitutionally protected

privacy must, at a minimum, include the freedom of an individual to choose the circumstances under which, and to whom, certain thoughts and feelings will be disclosed. See, Lora v. Board of Education, 74 F.R.D. 565, 570 (E.D. N.Y. 1977) citing, Ruebhausen & Brim, "Privacy and Behavioral Research", 65 Colum. L.Rev. 1184 (1965). Accordingly, the right of privacy does extend to an individual's liberty to make decisions regarding psychiatric care without unjustified governmental interference. Caesar v. Mountanos, 542 F.2d at 1067. See also, Hawaii Psychiatric Soc. Dist. Branch v. Ariyoshi, 481 F.Supp. 1028 (Hawaii 1979); In Re B, 482 Pa. 217, 394 A.2d 419 (1978).

The second strand of the right to privacy is the right to confidentiality - "the individual interest in avoiding disclosure of personal matters". Whalen

v. Roe, 429 U.S. at 599. There is little doubt that information contained in a psychiatrist's patient files will include personal matters. As a point of fact, the records of a psychiatrist contain the essence of a patient's being - the conscious and subconscious mind. Thus, the records of a psychiatrist are the mirror by which one can gaze into the reflected mind of the patient. Clearly, then, the records of a psychiatrist relative to a patient squarely fall within the protection of the Federal Right of Privacy.

III. OPINION OF COURT OF SPECIAL APPEALS OF MARYLAND

While the Court of Special Appeals of Maryland recognized that which is set forth above, that Court utilized an incorrect framework of analysis in holding that disclosure of the mental health

records was required. It is to that incorrect analysis and the cases to which this Petition now turns.

The Court of Special Appeals of Maryland attempted to analogize this matter with three factually diverse and discordant cases. The first, Whalen v. Roe, 429 U.S. 589 (1977), is cited for extending the Constitutional right of privacy to an individual's interest in their medical records. The Court of Special Appeals of Maryland cited this case as permitting the State's interest to negate any exercise of an individual's privacy interest in their medical records. Dr. K, et al., v. State Board of Physician Quality Assurance, 98 Md. App. 103, 632 A.2d 453, 458 (1993), cert. denied, __ Md. ___, ___ A.2d, __ (1994)(emphasis added).

In Whalen, this Court upheld a New York statute requiring physicians to

submit duplicate prescriptions written for Schedule II drugs to the state in response to a concern that these drugs were being diverted into unlawful channels. Whalen v. Roe, 429 U.S. at 591. The information disclosed to the state included only the patient's name, age and address. This Court concluded the statute's impact was insufficient to "constitute invasion of any right or liberty protected by the Fourteenth Amendment". Whalen v. Roe, 429 U.S. at 603-604. This Court's holding was premised on the non-personal nature of the information disclosed, as well as the pre-existing authority the State possessed in the area of drug regulation. This Court recognized that the use of particular Schedule II drugs could entirely be prohibited pursuant to the exercise of the state's police powers. Whalen v. Roe, 429 U.S. at 603.

The matter sub judice, however, involves the compelled disclosure of an individual's most intimate thoughts, emotions, as well as descriptions of conduct that may be embarrassing and publicly damaging. Hawaii Psychiatric Soc. Dist. Branch v. Ariyoshi, 481 F.Supp. at 1041, (upholding an individual's right to privacy in psychiatric records). Compelled disclosure of an individual's entire psychiatric treatment record is eminently personal and is not limited in scope or nature as was the disclosure permitted by the Whalen opinion. Furthermore, the state's police power cannot regulate what a patient will or will not disclose to a psychiatrist. Granting the state authority to compel disclosure of an individual's psychotherapy records against the patient's consent when neither the

psychiatrist/patient relationship or the individual's mental health has been placed in legal issue is a blatant infringement of the Constitutional right of privacy.

In Whalen, this Court held the New York statute did not inhibit the personal decisions relative to treatment as the patient to be prescribed Schedule II drugs still had the right to decide independently, with the advice of the physician, to forgo the medication. Whalen v. Roe, 429 U.S. at 603. Knowledge, however, that unauthorized disclosure of psychiatric records can be mandated by the state upon the suspicion, and with no determination of probable cause, that the psychiatrist has conducted himself unethically will have a chilling effect on all individuals in need of psychiatric care. A patient in a Whalen situation, can be informed that if they decide to

take a specific medication, their name, age and address will be released to the state. An entirely different area of privacy concern is engendered in permitting disclosure of an entire psychiatric record against the consent of a non-complaining patient. In this case, possible disclosure will work as an inhibition of treatment as the patient will not be as candid while the psychiatrist will not be as copious in note taking as a result of the spectre of disclosure. Hence, this case is distinct from Whalen in that this case involves the mental health records of a patient who has not placed those records at issue, has not filed any complaint against the treating psychiatrist, and the state has not demonstrated a non-hearsay rationale for those records.

The Whalen holding did not embrace all issues of the right of privacy. This Court simply held that "this [Whalen] record [did] not establish invasion of any right or liberty protected by the Fourteenth Amendment". See, Whalen, 429 U.S. at 606 (emphasis added). As discussed, supra, the disclosure of specific information, compelled by a specific New York statute requiring only non-invasive information is clearly distinct from disclosure of an entire psychiatric record of an identified individual patient.

The Court of Special Appeals of Maryland likewise erroneously concluded the facts of the matter sub judice were analogous to the matter of In Re Search Warrant (Sealed), 810 F.2d 67 (3rd Cir.) cert. denied, 483 U.S. 1007 (1987). In Re Search Warrant (Sealed) involved a

criminal investigation of insurance fraud. Following a determination of probable cause by a U. S. Magistrate, a warrant was issued authorizing the FBI to seize specific property as delineated by the warrant. The information sought consisted almost exclusively of financial/billing information.

In Re Search Warrant (Sealed) concerned the alleged fraudulent billing for specific procedures performed on specific dates. The patients' names, as well as information pertaining to the medical procedures had previously been voluntarily submitted to insurance companies for payment. The information sought by the investigators of this alleged criminal behavior was only to verify that the procedure had been performed. This very specific and limited data previously had been disclosed

to insurance companies by the individual patients. Disclosure of such procedures to the insurance company for reimbursement was and is a common practice of modern medical treatment. The patients relying on third party compensation for the cost of their medical treatment, although afforded a privacy interest in their medical decisions, had voluntarily disclosed the identical information sought by the government.

This case is clearly distinct from In Re Search Warrant (Sealed) in that there has been no voluntary disclosure of information which forms the basis of this investigation of Dr. K. The Board is not looking to verify specific treatment, dates or billing information, which had been previously and voluntarily disclosed by Patient A. Rather, the Board seeks to reveal the most personal and intimate

details of a confidential relationship between a psychiatrist and a patient.

The facts of the matter sub judice are disparate to the In Re Search Warrant (Sealed) case. This case concerns an administrative investigation, not criminal, initiated by an estranged wife and corroborated only by hearsay testimony. There was no neutral detached determination of probable cause, nor warrant expressly specifying information sought. Moreover, the records in issue are judicially recognized as highly sensitive and of a personal nature, unlike the billing information sought in the criminal investigation of In Re Search Warrant (Sealed). Thus, there is a grave distinction between the consequences of disclosing billing records and the impact and implications of disclosing records as highly sensitive as psychotherapy records.

The In Re Search Warrant (Sealed) Court expressly recognized this distinction by noting that their case "did not involve psychotherapeutic care and [the court] need not decide whether psychiatric records merit a higher degree of privacy sufficient to outweigh legitimate government interest in acquiring the information contained therein." See, In Re Search Warrant (Sealed), 810 F.2d at 72, n.5. Hence, the Third Circuit recognized the indisputable distinctions between billing information and pyschotheraputic records. Yet the Court of Special Appeals of Maryland seeking to justify its holding requiring the disclosure of Patient A's records completely ignored the Third Circuit's statement concerning the distinction between billing records and psychotherapeutic records. By relying on

the In Re Search Warrant (Sealed) holding, the opinion of the Court of Special Appeals of Maryland is indeed flawed by the language of the case it purportedly utilized as support.

In attempting to provide a further rationale for its holding, the Court of Special Appeals of Maryland relied on a third factually dissimilar case. That case, also from the Third Circuit and not dealing with psychotherapeutic records, was United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3rd. Cir. 1980). Because the Westinghouse case was decided before the In Re Search Warrant (Sealed) case and the In Re Search Warrant (Sealed) case expressly did not deal with psychotherapeutic records, the Westinghouse case is likewise inapposite sub judice. This is so because the Westinghouse case does not deal with the

issue of the higher degree of privacy to be accorded to mental health records than that to be accorded to physician billing records.

The cases cited by the Court of Special Appeals of Maryland and utilized as support for its opinion are factually distinct from the issue engendered by this petition. Those cases validate disclosure of medical billing information previously and voluntarily disclosed by the patient to a third party; and the results of routine medical procedures. Furthermore, the investigation of insurance fraud in In Re Search Warrant (Sealed) was a criminal investigation, the seizure of the medical records premised on a search warrant issued after a determination of probable cause which is clearly distinct from the matter sub judice. While it is true that the state does have an interest in

protecting future patients from an unethical, unscrupulous physician or psychiatrist, the state's interest in protecting the public must be carefully weighed against the fundamental right of privacy of the individual in non-authorized disclosure of personal information and their autonomy with regard to psychotherapeutic care.

In sum, the Court of Special Appeals of Maryland, attempted to adopt the holding of the above cited cases compelling disclosure of "medical records" to the state without providing any analysis demonstrative of similarities between the facts of those cases and this matter. The cases relied on by the Court of Special Appeals of Maryland explicitly addressed the heightened interest in the highly personal psychotherapy records and the likelihood the individual's privacy

interest in those records would prevail over the interest of the state. The Court of Special Appeals of Maryland elected to disregard those portions of the cases and offered no analytical guidance or reasoning as to its determination that the state's interest herein compelled the desecration of the fundamental constitutionally protected right of privacy.

IV. STANDARD FOR REVIEW AND PUBLIC IMPORTANCE

Having now demonstrated that the right of privacy does indeed attach to the mental health records of Patient A and the incorrect analysis of the Court of Special Appeals of Maryland, this Petitioner shall now discuss the appropriate standard for review and the public importance of this issue.

That the right of privacy does indeed

extend to decisions regarding psychiatric care does not automatically render void any and all regulations. Rather, psychiatric care may be regulated in ways that do not infringe protected individual choices, and even a burdensome regulation may be validated by a compelling state interest. Carey v. Population Services Intern., 431 U.S. at 685-686.

> "'Compelling' is of course the key word; where a decision as fundemental as whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests".

Id. at 686.

In the case sub judice, therefore, the standard of inquiry must be that because the disclosure of Patient A's mental health records burdens the individual's liberty to make decisions regarding psychiatric care, then Maryland

must have demonstrated that the disclosure represents the least restrictive means to achieve a compelling state interest, if any.

This Petitioner posits that the threat of disclosure and actual disclosure of personal information revealed to a psychotherapist in the course of treatment adversely affects the freedom of individuals to choose and to receive adequate psychiatric care. This, of course, affects the public-at-large. That is, the repercussion of the Court of Special Appeals of Maryland opinion is to jeopardize the care and treatment of those seeking psychotherapeutical assistance. This Petitioner explains.

The disclosure of the mental health records herein, if permitted to stand, will have a chilling effect on <u>all</u> treatment between patients and

psychotherapists. Namely, the disclosure of Patient A's records will inhibit candid communications between the patient and the psychiatrist. This inhibition will be further enhanced by the psychiatrist's fear that the notes and diagnoses can be reviewed by the state officials, revealing to those state officials highly personal and sensitive concerns of the patient.

This chilling effect has been considered by various courts. These courts correctly have concluded that disclosure of communications between an identified patient and the psychiatrist would deter individuals from seeking care and impair the therapy process itself! Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976); Lora v. Board of Education, 74 F.R.D. 565 (E.D. N.Y. 1977); Hawaii Psychiatric Soc., Dist. Branch v. Ariyoshi, 481 F.Supp. 1028 (D. Hawaii

1979). See also, In Re B, 482 Pa. 217, 394 A.2d 419 (1978). As these decisions conflict with the opinion of the Court of Special Appeals of Maryland on this most important issue, this alone is sufficient to grant this petition pursuant to Supreme Court Rule 10.1(b).

The Court of Special Appeals of Maryland did not address this most important issue. Rather, the Court of Special Appeals of Maryland was drawn to the fact that if the records of Patient A were not disclosed, then no investigation could be completed by the Board. (While this Petitioner disagrees with this statement for the reasons set forth infra, this argument ignores the strong presumption in favor of the constitutional right of privacy.)

If this Petitioner were to assume arguendo that the non-disclosure of the

records could halt the Board's investigation of Dr. K, this Petitioner notes that such a result is not surprising within the realm of constitutional law. For example, the Exclusionary Rule of the Fourth Amendment of the United States Constitution works to exclude evidence obtained in contravention to the Fourth Amendment. The question of whether to exclude evidence under the Fourth Amendment does not concern itself with whether the exclusion will work to halt any possible criminal conviction. To the contrary, the question is whether the evidence was obtained in contravention to the Fourth Amendment, thereby warranting its exclusion so as to further the interests and policies imbued in the Fourth Amendment. Should the exclusion result in a dismissal of criminal charges, so be it as that is the price to be paid

for our Bill of Rights.

In the case sub judice, the same analogy of the exclusionary rule needs to be applied. That is, if the fundamental right of privacy is deemed to be at play, then whether the affirmance of that right will harm a state investigation should have no bearing on whether the privacy right should be affirmed. Rather, the question should, and must, center and focus on whether a compelling state interest is present to quash the privacy right. If no compelling interest is had, then the privacy right must be upheld notwithstanding whether the maintenance of that right will halt a state investigation. If that be the case, then, again, that is the price we pay for our Bill of Rights and the individual liberties found therein.

Concomitant with this constitutional

exclusion is case law. The case of Taylor v. United States, 95 U.S. App. D.C. 373, 222 F.2d 398 (1955) is an outstanding example. In that case, the defendant was convicted of robbery, housebreaking, and grand larceny. At the trial, defendant took the position that he was not of sound mind to stand trial. During the course of the defendant's trial, the District Court permitted the testimony of defendant's treating psychiatrist, notwithstanding a privilege thereto. That privileged testimony established that defendant was of sound mind and that he was "going along with a gag" that he was not mentally sound to stand trial.

On appeal, the United States Court of Appeals for the District of Columbia reversed defendant's conviction. That reversal was based upon the testimony admitted by defendant's treating

psychiatrist. In reversing, the Court stated:

> "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition... It would be too much to expect them to do so if they knew that all they said - and all that they psychiatrist learns from what they say - may be revealed to the whole world..."

222 F.2d at 401 (citing Guttmacher and Weihofen, Psychiatry and The Law, p.272 (1952)). Hence, upon the principle behind the need for confidentiality to not inhibit treatment, the Court reversed a criminal conviction. Therefore, based upon the above recitation of constitutional law as well as case law, the Court of Special Appeals of Maryland's

concern about a quelled investigation absent Patient A's records does not support the Court's rationale to order disclosure of Patient A's records.

The crux of the Court of Special Appeals of Maryland opinion requiring disclosure and hence its "compelling interest" concerned the need for investigation of Dr. K. That is, in its opinion, the Court of Special Appeals of Maryland held that Petitioner's right of privacy had to surrender to the public good as the Board was investigating Dr. K. This statement, however, requires further review.

To begin, Petitioner was once a patient of Dr. K. That doctor-patient relationship concluded. Sometime thereafter, Petitioner and Dr. K met and began to date. (As a point of fact, Petitioner and Dr. K are married today.)

As a result of this, complaints were made to the state that perhaps Dr. K was running afoul of the American Medical Association's Principles of Medical Ethics, Section 2. Therein, it is stated:

> A physician shall deal honestly with patients and colleagues, and strive to expose those physicians deficient in character or competence, or who engage in fraud or deception.

The pertinent annotation to that section provides:

> Sexual activity with a patient is unethical. Sexual involvement with one's former patients generally exploits emotions deriving from treatment and therefore almost always is unethical.

With regard to the state's investigation of Dr. K, the annotation is the area where the state has its concern; that is, Dr. K's relationship with a former patient. For this investigation, the state asserts that it requires access to Petitioner's

mental health records. In response, Petitioner questions the relevance of her records to the investigation. The answer, submits Petitioner, to this question is none. Rather, what is contained in the Petitioner's records has absolutely nothing to do with the charge that Dr. K has allegedly violated the Principles of Medical Ethics. In sum, therefore, for the state to proceed against Dr. K, the state does not require an invasion of Petitioner's privacy by virtue of the review of Petitioner's records. Rather, the state need only assure itself that Dr. K has indeed violated the Principles of Medical Ethics as set forth above. That can be accomplished by a less invasive method as suggested by the Supreme Court of Iowa in McMaster v. Iowa Board of Psychology Examiners, 509 N.W.2d 754 (Iowa 1993).

In that case, the Iowa Board was investigating a psychiatrist. The Board subpoenaed the records of a second psychiatrist treating a patient whom had married the psychiatrist under investigation. (This is the exact same factual situation herein.) Therein, the Court held that the patient's records were protected by the constitutional right of privacy and the state was required to show that its need for the records outweighed the patient's right to privacy. Because, however, the Court was not satisfied with the record as created by the trial court, it remanded the case for a further record determination.

Upon the remand, the Court concluded that the patient needed to be involved in the procedure. That is, the Iowa Board must directly notify the patient of its attempt to obtain the records. If the

patient, such as Patient A, objects, then perhaps a less intrusive means could be constructed to avoid the constitutional problem engendered.

For example, in this case the Board is interested - pursuant to its citation at Section 2 of the American Medical Association's Principles of Medical Ethics - with sexual activity with a patient. Patient A could be placed under oath and asked whether during treatment sexual activity took place. In utilizing this procedure, the records are protected and the state will receive the investigatory information it allegedly requires.

The phrase "allegedly requires" has been utilized because the Board herein is not investigating Dr. K for anything done during his treatment of Patient A. Rather, the gravamen of the investigation concerns:

> "sexual involvement with one's former patients [as it] generally exploits emotions deriving from treatment and therefore almost always is unethical".

Annotation to American Medical Association's Principles of Medical Ethics, Section 2. This is the gravamen of the Board's investigation because it was after Dr. K began to date Patient A following his treatment termination of Patient A that the complaints to the Board were filed. In sum, therefore, Dr. K's treatment itself has nothing to do with the area of the Board's investigation.

When one further considers that Patient A and Dr. K have now married, any worry - as expressed in the Annotation - concerning exploiting emotions falls to the wayside. Rather, brought to the forefront is that the State of Maryland is now contemplating a disciplinary action

against Dr. K for marrying a former patient. A Constitutional concern of privacy that is likewise implicated herein. See e.g., Carey v. Population Services Intern., 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (wherein this Court has recognized an individual's right to make decisions free from unjustified governmental interference on matters relating to marriage). Therefore, Maryland can continue its investigation of Dr. K without a review of Patient A's records. Hence, not only has Maryland not demonstrated a compelling reason for disclosure, it has not explored other less

invasive options in gathering information prior to attempting to invade the highly confidential and personal mental health records of Patient A.

In its opinion, the Court of Special Appeals of Maryland attempted to provide Patient A with solace in that the Board officials are charged by law to keep the mental health records confidential. This solace is a paper tiger when examined. This Petitioner asserts that the compelled disclosure to and maintenance by the State of Maryland of the personal information revealed by a patient to a psychiatrist is itself an impermissible intrusion into the individual's right of privacy, irrespective of whether the information is disclosed to the public. While this Petitioner is aware of this Court's approval of disclosure of information in the Whalen case, here the degree and

character of the disclosure is far more intrusive. A pscyhiatrist's records can include the patient's most intimate thoughts and emotions, as well as descriptions of conduct that could be embarassing or illegal. The possibility that these records could be disclosed to anyone, whether it be state officials or the public, is sufficient to constitute an intrusion into the right of privacy. See, McKenna v. Fargo, 451 F.Supp. 1355, 1380-81 (D.N.J. 1978), aff'd., 601 F.2d 575 (3rd Cir. 1979) (Table). Thus, even if the state officials do maintain the records in strict confidence, the fact that these faceless bureaucrats are reviewing these records constitutes the invasion of privacy to which Patient A seeks to halt with this petition.

In sum, as noted supra, the Board does not require Patient A's records for

its investigation of Dr. K. Further, the lack of that record review will not quell any state investigation. This is because Maryland does not need nor require Petitioner's mental health records to proceed with the investigation of Dr. K. This is so because the Board is investigating whether Dr. K had had sexual relations with a former patient. A review of Petitioner's records will not further that investigation, as Dr. K was not treating Patient A when the alleged unethical activity took place. Thus, the lack of a review of Petitioner's records will not hamper that investigation. Therefore, the state has no need for Petitioner's records and thus no compelling interest is presented sufficient to quash Petitioner's fundamental right of privacy in those records.

The final point to be presented concerns why Petitioner is so adamant in her refusal to release her records. The Court of Special Appeals of Maryland noted, if the records are to be disclosed to the state, they will be kept confidential. Petitioner's response thereto is that she saw Dr. K and told him her innermost feelings and secrets concerning herself. In sum, she bore her "soul" to Dr. K. Now - at no fault to her - some faceless bureaucrats wish to invade that privacy. Petitioner's damage will occur when and if such a disclosure is had, even if the state does maintain its confidentiality over the records. Therefore, once the records are released, Petitioner's damage will be manifested and her right of privacy will be invaded due to no fault of her own. This invasion of privacy will then have the aftershock of

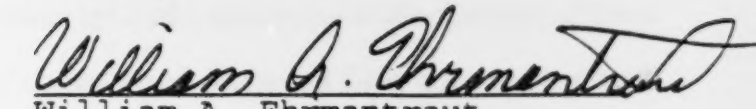
causing harm to the whole realm of psychotherapy as patients will be inhibited from being fully candid, while physicians will take less copious records for fear of a required records disclosure. Therefore, the public-at-large will be damaged by the state's Pyrrhic victory in its stated desire to protect the public. Accordingly, Petitioner respectfully requests that this Court review the opinion of the Court of Special Appeals of Maryland on this most important issue.

CONCLUSION

Petitioner respectfully requests that this Honorable Court grant her petition for writ of certiorari on this fundamental issue of extreme public policy.

Respectfully submitted,

WHARTON, LEVIN, EHRMANTRAUT, KLEIN & NASH



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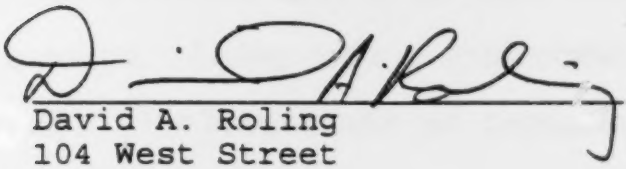

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Counsel for Petitioner

APPENDICES

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

DR. K. :

Plaintiff :

v. : Miscellaneous
Petition No. 8620

STATE BOARD OF :
PHYSICIAN QUALITY UNDER SEAL
ASSURANCE

Defendant :

ORDER

Upon consideration of Patient A's Motion for Reconsideration, and any opposition thereto, it is this ____ day of _____, 1992.

ORDERED,

(A) That a protective order be and hereby is ENTERED stating that the mental health records of Patient A are not to be disclosed; or

(B) That the subpoena duces tecum issued by the Defendant be and hereby is QUASHED.

_____
Irma S. Raker, Judge
of the Circuit Court
For Montgomery County

12/22/92
Motion for Reconsideration
DENIED, Irma Raker

APPENDIX B

COURT OF SPECIAL APPEALS OF MARYLAND

No. 138, Sept. Term, 1993

DR. K, et al.

v.

STATE BOARD OF PHYSICIAN
QUALITY ASSURANCE

Nov. 2, 1993

This is an appeal from an order of the Circuit Court for Montgomery County denying a Motion to Quash Subpoena or in the Alternative for a Protective Order, and a denial of a Motion for Reconsideration. The State Board of Physician Quality Assurance (the Board), appellee, received two formal written complaints that Dr. K (a psychiatrist licensed to practice in Maryland) and his

former patient ("patient A"),[1] both appellants here, were having a romantic relationship, and that Dr. K was depressed and abusing alcohol.

The Board, pursuant to its legislative authority, initiated an investigation and subpoenaed Dr. K's records relating to Patient A's treatment. Dr. K filed a motion in the circuit court to quash the subpoena. That motion was granted. The Board thereafter moved to rescind the order and for a hearing on the motion's merits. The request for a hearing was granted. The Board filed an opposition to Dr. K's motion to quash and its own motion to compel compliance with the subpoena.

---

[1]The record in this case is sealed to protect the parties identities. We shall refer to the parties as they have been designated in the circuit court and in the briefs.

Dr. K opposed that motion and the Board responded.

A hearing was held, after which the court denied the motion to quash the subpoena, but stayed enforcement for thirty days pending a possible appeal. Patient A then entered the case, filing a Motion for Reconsideration, raising the constitutional issue of her right to privacy and requesting an order further staying the final judgment's effect. Both motions were denied. This appeal followed.[2] Appellants raise only

---

[2]The only matter litigated in the case was the issuance or non-issuance of the subpoena.

In Baltimore City Dept. of Social Services v. Stein, 328 Md. 1, 16 (1992), the Court noted an area where the collateral order doctrine has been applied:

> We have declined to follow the Alexander rule [a finding of contempt before appeal permitted] at least when, in the procedural posture of the case, the only matter before the trial court is the discovery order, i.e., the motion to quash.

one question on appeal:

> Does a patient's constitutional right to privacy bar the disclosure of mental health records to the Board of Physician Quality Assurance when the patient asserts such a right upon patient's physician being subpoenaed to produce those records to the Board of Physician Quality Assurance?

It does not, and we shall affirm.

Appellants' question addresses only

The Court went on to note its holding in Unnamed Attorney v. Attorney Grievance Commission, 303 Md. 473, 480 (1985).

> It has consistently been held in this State that where a court proceeding is commenced to quash or to enforce an administrative subpoena, summons, [or] search warrant...issued by an administrative agency or official, ...and where the court's order terminates the court proceeding, the order is final and appealable. The fact that the administrative proceedings may not be terminated does not render the court order interlocutory if nothing remains to be done in the trial court.

See also, In Re Search Warrant (Sealed), 810 F.2d 67, infra.

patient A's right to privacy under the United States Constitution. The Board preliminarily argues that, because the constitutional issue was first raised in a Motion for Reconsideration which was summarily denied by the trial court, it is not properly before this Court. It cites

Dintaman v. Board of County Commissioners, 17 Md. App. 345, 350-51 (1973), for the proposition that "nothing is better settled than the rule that a question as to the constitutionality of a statute will not be considered on appeal when not properly raised and decided by the lower court." Dintaman supports the proposition, but deciding this appeal on jurisdictional grounds would likely result in additional litigation and appeals. We shall address the issue, because it was

in fact raised below and because we may decide an issue if it will "avoid the expense and delay of another appeal." Maryland Rule 8-131(a).

Appellants also argue in their brief, as Dr. K argued below, that the statutes in question do not give the Board jurisdiction to regulate Dr. K's behavior or to subpoena patient A's records.

Although not clearly raised in the question presented on appeal, we shall address these issues in the interest of judicial economy. Maryland Rule 8-131(a).

Facts

The complaints to the Board resulted from a visit to the complainants, both of whom are physicians and colleagues of Dr. K, by Dr. K's estranged wife. She alleged that Dr. K was having a romantic

relationship with a former patient and that he was depressed and drinking heavily. The complainants then visited Dr. K personally and discussed his wife's charges. After listening to Dr. K's explanation of the events, which included an admission by the doctor that he was then maintaining a romantic relationship with Patient A, they informed him that they would be filing a complaint with the Board because they felt that his relationship with a former patient violated professional ethical standards for a psychiatrist.

The Board is a State regulatory agency that is legislatively empowered to license physicians in Maryland and to regulate the licensees. A weekly review panel meets to consider complaints and determine which complaints merit investigation. After reviewing the

complaints against Dr. K, the panel determined that an investigation was appropriate. The Board then issued a subpoena duces tecum, pursuant to its statutory authority, for all of the records in Dr. K's custody and control concerning his treatment of Patient A. Dr. K informed Patient A of the request and asked if she wished to give her permission to release the records. Patient A refused. Dr. K then responded to the complaints in a letter to the Board, but refused to provide the subpoenaed records.

According to the record, Dr. K has yet to be charged with any improper or illegal conduct. He is merely the subject of an administrative investigation.

The Board's Authority Over Dr. K's Actions

Initially, appellants offer two arguments as to why the Board has no authority to investigate this matter. They first argue that because Dr. K and Patient A's personal relationship began after the doctor-patient relationship terminated it is beyond the scope of the doctor-patient relationship and thus the Board's authority "to 'protect' Patient A" is suspect. In support, appellants cite McDonnell v. Commission on Medical Discipline, 301 Md 426 (1984).

In McDonnell, the question was "whether a physician's attempt to intimidate adverse witnesses scheduled to testify against him at a medical malpractice trial constitutes '[i]mmoral conduct of a physician in his practice as a physician' in violation of [the] Maryland Code..." Id. at 428. The commission found as a matter of law that

Dr. McDonnell had violated the Code provision by having two medical experts contact the doctors scheduled to testify against him at trial in order to intimidate the doctors. Id. at 431. The Court of Appeals disagreed, holding that the conduct did not fall under the statute as it then appeared. The statute's plain language restricted disciplinary action to "[i]mmoral conduct of a physician in his practice as a physician." Id. at 435 (citing Md. Code Ann. Art. 43 § 130(h)(8) (1957, 1980 Repl. Vol.)).

The legislature has since amended the relevant statutory language, enlarging the Board's area of authority. That provision was recodified in 1981 Md. Laws, ch. 8, as Md. Health Occ. Code Ann. § 14-504. The language in what is now Health Occupations article, section

14-404(3), was amended in 1988 Md. Laws, ch. 10g, to read: "(3) Is guilty of immoral or unprofessional conduct in the practice of medicine...." (Emphasis added.) Further, the Board has the power to initiate investigations upon receipt of a signed, written complaint, Md. Code (1991 Repl. Vol. & 1993 Cum. Supp.), § 14-205(a)(2) of the Health Occ. Article (Health Occ.) and powers that aid in conducting investigations, id. at § 14-401 et seq.

Both parties in their briefs cite the American Medical Association, The Principles of Medical Ethics, section 2, annotation 1, as a probable basis for the Board's belief that Dr. K's behavior may be unprofessional. Suspected unprofessional conduct in his practice would give the Board statutory authority to investigate. The Principle of Medical

Ethics, section 2 states:

> SECTION 2
>
> A physician shall deal honestly with patients and colleagues, and strive to expose those physicians deficient in character or competence, or who engage in fraud or deception.

Annotation 1 states, in full:

> 1. The requirement that the physician conduct himself/herself with propriety in his/her profession and in all the actions of his/her life is especially important in the case of the psychiatrist because the patient tends to model his/her behavior after that of his/her therapist by identification. Further, the necessary intensity of the therapeutic relationship may tend to activate sexual and other needs and fantasies on the part of both patient and therapist, while weakening the objectivity necessary for control. Sexual activity with a patient is unethical. Sexual involvement with one's former patients generally exploits emotions deriving from treatment and therefore almost always is unethical.

It is premature for us to decide whether Dr. K's records indicate

unprofessional conduct in his practice or a violation of the statute, and thus whether the Board has disciplinary jurisdiction, or whether patient A's records are relevant to the ultimate issue the Board might have to address. That is the reason for the investigation. Dr. K's admission that he is having a "romantic relationship" with Patient A, coupled with the statutory language and the statement of ethics is certainly a basis upon which to begin an investigation. An investigation is not a statutory violation or disciplinary action; it is used to determine if one has occurred and the other is necessary. We cannot say that the statute does not give the Board the authority to begin an investigation in this case.

Second, appellants argue that Patient A's records should not be

disclosed because she has not complained about Dr. K's behavior.

If a patient's complaint were necessary for the Board to investigate, there would never be full investigations in cases where the doctor was able to persuade the patient not to complain. The argument has no merit.

We also consider the Board's direct statutory authority to view the records. Maryland Code (1990 Repl. Vol., 1993 Cum. Supp.) § 4-307 of the Health-General Article (Health-Gen.) gives the Board the right to examine Patient A's records, and reads, in pertinent part:

> (h)...(1) A health care provider shall disclose a medical record without the authorization of a person in interest:
> ...
> (vi) 1. In accordance with a subpoena for medical records on

specific recipients: [3]

> A. To health professional licensing and disciplinary boards[4] for the sole purpose of an investigation regarding licensure, certification, or discipline of a health professional or the improper practice of a health profession ....

Further, S 4-307(h)(4) reads:

> This subsection may not preclude a health care provider, a recipient, or a person in interest from asserting in a motion to quash or a motion for a protective order any constitutional right or other legal authority in opposition to disclosure.

A constitutional right to privacy, as we have said, was asserted. We now address that issue.

---

[3]The Board has the authority to issue subpoenas pursuant to Health Occ. §§ 14-206(a) and 14-401(f).

[4]The Board is both a licensing and disciplinary board. See Health Occ. §§ 14-204 and 14-301.

Privacy Right of Patient A in her Medical Records Under the United States Constitution

"It is, of course, no longer open to question that the right of privacy is protected by the federal constitution and that where the right is applicable, regulation limiting it must be justified by a 'compelling state interest.'" Montgomery County v. Walsh, 274 Md. 502, 512 (1975), appeal dismissed, 424 U.S. 901 (1976). See also, Neville v. State, 290 Md. 364, 372-73 (1981); Doe v. Commander, Wheaton Police Dept., 273 Md. 262, 272 (1974). "And as courts have held, medical records are clearly within this constitutionally protected sphere." In Re Search Warrant (Sealed), 810 F.2d 67, 71, cert. denied, 483 U.S. 1007 (3rd Cir. 1987). See also, Whalen v. Roe, 429 U.S. 589, 598 (1977); United States v.

Westinghouse Elec. Corp., 638 F.2d 570, 577 (3rd Cir. 1980); Hodge v. Carroll County Dept. of Social Services, 812 F. Supp. 593, 600 (D. Md. 1992); Shoemaker v. Handel, 619 F. Supp. 1089, 1105-06 (D.C.N.J. 1985).

We believe that Patient A has a constitutional right to privacy in Dr. K's records of her psychiatric treatment. Whalen, 429 U.S. 589, is often cited for extending a constitutional privacy right to the disclosure of highly personal information. Whalen involved a New York State statute that required doctors to submit duplicates to the State of all prescriptions written for schedule II drugs. The State recorded the information on computers and stored the copies, using the records to help reveal abuses in prescribing certain drugs. The law was challenged as unconstitutional on

its face by a group of doctors and patients. Id. at 591-95. After considering the State's physical security precautions in protecting the data, and legislative prohibition against public disclosure, the Court concluded:

> Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.

Id. at 602 (footnote omitted). The Court further held that the New York statute's impact is insufficient "to constitute an invasion of any right or liberty protected by the Fourteenth Amendment." Id. at 603-04 (footnote omitted). So while the right was recognized in Whalen,

the State's interest negated any exercise of that right.

In Re Search Warrant (Sealed), 810 F.2d 67, was decided upon facts analogous to the instant case. In Search Warrant, a physician was under investigation by the Federal Bureau of Investigation for insurance fraud. The FBI believed that certain patient records were relevant to its investigation. A United States Magistrate found probable cause and issued a warrant authorizing a search of the physician's office and the seizure of certain specified records. Id. at 69. The day of the seizure, the physician filed a "Motion to Enjoin or, in the Alternative, for Relief From, Execution of Search Warrant" in federal district court. Id. The district court denied the motion, but ordered the record sealed and

the information treated as confidential. The physician then requested a stay of the order. That request was denied also. Id.

Throughout the proceedings the physician was not under indictment, he was only being investigated. The Third Circuit allowed the unusual appeal because:

> any privacy interests the patients may have are immediately threatened by the government having obtained such highly sensitive personal information as may be contained in their medical files.... [A]ppellate review should not be postponed - and perhaps entirely foreclosed - by a rule which would make such review available only if and when the physician is indicted, prosecuted, or convicted.

Id. at 70.

The Court, after balancing the recognized privacy right against the state's interest, held that the "significant government interests in

investigation clearly outweigh any individual privacy interests ...." Id. at 73. It considered, among other things, that:

> the identities of the patients involved are already known ... and their privacy interests are thereby diminished. Additionally, two separate mechanisms exist to guard against unauthorized disclosure. Initially, ...the district court's special directions operate to maintain the confidentiality of these records. Thereafter, ... presentation to a grand jury will not lead to untoward dissemination.

Id. at 72-73 (citation omitted). There was also a statute expressly authorizing an administrative subpoena of medical files and a demonstrated need for government access to the records.

We agree with the Third Circuit's reasoning as applied to the case at bar. Patient A has a right to privacy in her medical records. That right, however, is not absolute; "[t]he individual privacy

interest in the patients' medical records must be balanced against the legitimate interests of the state in securing the information contained therein." Id. at 71-72. See also, New York State Ophthalmological Soc. v. Bowen, 854 F.2d 1379, 1389 (D.C. Cir. 1988), cert. denied, 490 U.S. 1098 (1989); Westinghouse, 638 F.2d at 578; Hodge, 812 F. Supp. at 600; Doe v. Borough of Barrington, 729 F. Supp. 376, 382-83 (D. N.J. 1990); Doe v. General Services Admin., 544 F. Supp. 530, 546 (D. Md. 1982); Walsh, 274 Md. at 512-14.

Westinghouse, 638 F.2d 570, provides an analytical framework for balancing the competing rights and interests. There, the issue was whether certain employee health records could be turned over to the

National Institute for Occupational

Safety and Health without the employees' authorization. Id. at 572-73. The court stated, "Generally, the reporting requirements which have been upheld have been those in which the government has advanced a need to acquire the information to develop treatment programs or control threats to public health." Id. at 578. In those cases where a court has allowed an intrusion into the privacy right in medical records "it has usually done so only after finding that the societal interest in disclosure outweighs the privacy interest on the specific facts of the case." Id. After deciding that the employees had privacy rights in their medical records, the court specified several factors to consider in the "delicate task" of weighing the government's competing interest. Id. Those factors are: the

type of record requested, the information it contains, the potential for harm in subsequent nonconsensual disclosure, the injury in disclosure to the relationship for which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the government's need for access, and whether there is an express statutory mandate, articulate public policy, or other public interest militating towards access. Id. See also Search Warrant, 810 F.2d at 72; Borough of Barrington, 729 F. Supp. 376; Shoemaker, 619 F.Supp. at 1106; United States v. Colletta, 602 F. Supp. 1322, 1327, aff'd., 770 F.2d 1076 (1985) (all applying the Westinghouse factors in weighing individual privacy rights against the government's legitimate interests). We shall apply these factors to the facts in the instant

case.

Type of Record and Information Contained Therein

The subpoena in this case directed Dr. K to deliver "any and all medical records" of Patient A. Dr. K was Patient A's psychiatrist. Appellants represent that the records in question "are, in fact, a mirror by which one can gaze into the reflected mind of the patient.... Patient's essence of being - the conscious and subconscious mind - [is] ensconced within the records sought ...." We do not dispute that representation. We presume that the records contain at least Dr. K's notes from his sessions with Patient A and any medical information, such as a physical and mental health history and a record of prescribed medication.

We understand the intensely personal and extremely delicate nature of the

information contained in the records. There is a clear difference between these records and the prescription copies at issue in Whalen, which were not "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." Whalen, 429 U.S. at 602.

The Potential for Harm in Subsequent Nonconsensual Disclosure

Accounting for the personal and sensitive nature of psychiatric records, the potential for harm in subsequent disclosure is plainly apparent. Despite great advances in public consciousness, psychiatric treatment can still carry a stigma in our society. The consequences of nonconsensual public disclosure of psychiatric records might well be harmful to Patient A.

The Injury in Disclosure to the Relationship for Which The Record was Generated

The disclosure in this case is pursuant to Health-Gen. § 4-307(h)(1)(vi)1.A. and Health Occ. §§ 14-401(a) and (f). Under those sections the Board is entitled to subpoena and review Patient A's records without her consent solely to investigate charges against Dr. K. The psychiatrist-patient relationship is a very personal one, any disclosure could conceivably affect the relationship. It is difficult to predict what impact the disclosure of Dr. K's records would have on any professional relationship with Patient A. We note, however, that Dr. K. and Patient A maintain that their patient-psychiatrist relationship ended several months before the personal

relationship developed. Therefore, by appellants' own admissions, there would be no injury to the patient-psychiatrist relationship, as it is their view that it did not exist at the time the records were subpoenaed.

The Adequacy of Safeguards to Prevent Unauthorized Disclosure

The unauthorized disclosure of Patient A's records is prohibited by several statutes.

Health-Gen. § 4-302 et seq., address the confidentiality of medical records in general. Section 4-302(a) requires health care providers to keep medical records confidential, and allows disclosure only as provided by Maryland law. Section 4-302(b) provides exceptions for administrative records and disclosures governed by other confidentiality

provisions.

Section 4-302(d) reads:

> Redisclosure. -- A person to whom a medical record is disclosed may not redisclosed the medical record to any other person unless the redisclosure is:
>
> (1) Authorized by the person in interest;
>
> (2) Otherwise permitted by this subtitle...

There is no other provision in this subtitle permitting redisclosure of mental health records by the Board. [5]

Under § 4-309, disclosing a medical record in violation of the subtitle subjects the violator to a possible criminal fine and to actual damages in a civil suit.

Health Occ. §§ 14-401 et seq., give the Board the authority to take disciplinary actions against physicians.

---

[5]Initial disclosure to the Board is permitted without the patient's authorization by Health-Gen. §4-307(h)(1)(vi)1.A. See discussion infra.

Section 14-410 mandates that the Board's records and decisions are not discoverable in criminal or civil proceedings unless all parties stipulate to disclosure, a civil action is brought by the party being investigated, or the information is otherwise admissible as evidence.

Section 14-411(b) provides that, "[e]xcept as otherwise expressly provided in this section, the Board or any of its investigatory bodies may not disclose any information contained in a record." The section goes on to list the bases upon which the Board can disclose information. The permitted disclosures are those necessary for the Board to effectuate its purpose - disciplining physicians. They are not public disclosures that could cause Patient A significant harm.

Health Occ. § 14-501, discusses "medical review committees." Section 14-501(b)(1) defines a medical review committee as "[a] regulatory board or agency established by State or federal law to license, certify, or discipline any provider of health care..." This definition clearly encompasses the Board. Section 14-501(d)(1) reads:

> Except as otherwise provided in this section, the proceedings, records, and files of a medical review committee are not discoverable and are not admissible in evidence in any civil action arising out of matters that are being reviewed and evaluated by the medical review committee.

The only exceptions are when the civil proceeding is brought by a party who claims to be aggrieved by the medical review committee's decision and when the records before the committee are

otherwise
subject to discovery and introduction as evidence in a civil trial. Id. at § 14-501(e).

The legislature has certainly addressed the area of confidentiality. Disclosure of medical records is restricted and penalties are prescribed for unauthorized disclosure. As our role is not to legislate but to interpret laws, we conclude that the legislature's actions in this area are adequate to safeguard against unauthorized disclosure

The Government's need for Access

Health Occ. § 14-205(a)(2) empowers the Board to investigate any written complaint that alleges violations of Title 14 - governing the licensing and conduct of physicians in Maryland. It

may discipline a physician licensed to practics in Maryland for a broad range of behaviors, including "immoral or unprofessional conduct in the practice of medicine," professional incompetence, habitual intoxication, and practice below the standard of care. Health Occ. §§ 14-404(a)(3), (4), (7) and (22). According to the Board, each behavior is implicated in the complaints filed against
Dr. K.

To deny the Board access to Dr. K's patient records to investigate allegations of professional misconduct is to deny it
the ability to carry out its legislative mandate and make decisions based on facts. Assuming, arguendo, that Dr. K did engage in unprofessional conduct in his treatment of Patient A, and that his

unprofessional conduct resulted in a post-treatment romantic relationship with Patient A, a lack of access to Patient A's records effectively forecloses any meaningful investigation into that conduct and any basis for disciplinary action. The Board's mission, to regulate the use of physicians' licenses in Maryland, requires that it have access to the records generated directly from the use of that license.

Whether There is an Express Statutory Mandate, Articulated Public Policy, or Other Public Interest Militating Towards Access

There is indeed an express statutory mandate allowing the Board access to Patient A's records. Health-Gen. § 4-307, addressed earlier. Appellee, in its memorandum supporting its Motion to Compel and its Opposition to Motion for

a Protective Order or to Quash, in discussing this statute, states:

> The provision requiring disclosure of the records upon subpoena: 1) is in the mental health record portion of the statute, 2) is a mandatory disclosure, 3) is a disclosure expressly without the consent of the patient, and 4) overrides any privilege.... The General Assembly, after five years of drafting on the legislation, consideration during two sessions, with an intervening summer study, obviously made a policy choice in this area.

Early in the process of creating this legislation, in January, 1986, the Attorney General issued a Report to the Governor on the Confidentiality of Mental Health Records. The report noted the conflicts between the then-existing privacy provisions in the various health records statutes and stated that the elimination of those contradictions was a goal of the legislation. The report recommended that "[i]dally, a balance

should be reached between the patient's right to confidentiality and society's sometimes powerful need to have access to the patient's records." Office of the Attorney General, Report to the Governor on the Confidentiality of Mental Health Records 9 (January, 1986) (on file with Maryland State Law Library). The report further recommended a comprehensive reference statute dealing with disclosure of mental health records. Id. at 10.

One statute that ultimately resulted from this process is Health Gen. § 4-307, set forth in part above. It is evident that the statute's clear language results from a policy decision arrived at through the cooperation of the State's executive and legislative branches.

Further, the State has a significant interest in protecting its citizens and the public health.

> [N]o person has an absolute vested right to practice medicine, but only a conditional right which is subordinate to the police power of the State to protect and preserve the public health. The State, in the performance of its duty to protect and preserve the public health, has the power, within constitutional limitations, to regulate the practice of medicine by those engaged therein. This regulatory power is justified by the fact that the practice of medicine requires special knowledge, training, skill and care, that health and life are committed to the physician's care, and that patients ordinarily lack the knowledge and ability to judge his qualifications.

Commission on Medical Discipline v. Stillman, 291 Md. 390, 405-06 (1981) (citing Aitchison v. State, 204 Md. 538, 544, cert. denied, 348 U.S. 880 (1954)) (citation omitted). See, Pitts v. State Board of Examiners, 222 Md. 224, 226 (1960); Cocco v. Maryland Comm'n. on Medical Discipline, 39 Md. App. 170, 173 (1978), cert. denied, 444 U.S. 868 (1979).

In the case sub judice, the State, through the Board, seeks a limited, but nonetheless significant, invasion into Patient A's privacy. A weighing of all the factors discussed above leads us inexorably to the conclusion that the State's interest outweighs Patient A's privacy right in this instance. To give a patient, in effect, a veto over the Board's power to regulate licensed physicians would be to eviscerate the Board's ability to protect the larger public interest. This is especially true in a case such as this - where the patient may not object to, or may even support, the physician's allegedly unprofessional or unethical behavior. A decision in favor of Patient A would allow those physicians who are unscrupulous and in a position to exert influence over their patients to stop a

preliminary investigation by the Board in its tracks.

We emphasize that as yet no charges have been filed and no disciplinary action has been taken against Dr. K. At this stage, it is just as likely as not that the Board will agree with Dr. K's defense to the complaints filed against him and take no disciplinary action. Further, there are statutory provisions protecting Patient A's records from being used for any purpose other than this investigation of Dr. K. Patient A may be entitled to sue for civil damages for any unauthorized disclosure of her medical records.

We shall briefly address appellants' concern regarding the hearsay basis for the initial complaints. First, "administrative agencies are not bound to observe the 'technical common law rules

of evidence."' Stillman, 291 Md. at 422 (quoting Dickinson-Tidewater v. Supervisor, 273 Md. 245, 253 (1974)); Hill v. Baltimore Co., 86 Md. App. 642, 658, cert. denied, 323 Md. 185 (1991); Department of Public Safety v. Scruggs, 79 Md. App. 312, 321 (1989); Tron v. Prince George's County, 69 Md. App. 256, 261 (1986). See Arnold Rochvarg, Hearsay in Administrative Hearings: The Maryland Experience and Suggestions for Change, 21 U. Balt. L. Rev. 1, n.2, passim (1991). Second, the same public policy considerations that contributed to favoring the State's interest over Patient A's constitutional privacy right militate against our restricting the Board's ability to gather and utilize information in deciding whether or not to conduct an investigation. Hearsay information is probably the basis for

investigations in many areas of governmental licensing, from physician's licenses to liquor licenses to marriage licenses.

Furthermore, while hearsay may be the basis for an investigation by the Board, before any formal action is taken against Dr. K, he is entitled to a hearing before a hearing officer, to be represented by counsel at that hearing, and to have any factual finding supported by clear and convincing evidence. Health Occ. § 14-405.

Finally, we note that although the initial communication to the complainant doctors was indeed from Dr. K's wife, who may well have been biased, the complainant doctors, prior to filing their complaint, met with Dr. K. in an attempt to get his side or his version of what was occurring. One of the doctors,

in his complaint to the Board, informed the Board that Dr. K had himself admitted that the relationship was ongoing and of a romantic nature. The other complainant doctor informed the Board that, when Dr. K was informed that his wife had said he was having an affair with the woman identified in the case sub judice as Patient A, he acknowledged that that assertion was valid. Additionally, in his initial response to the Board, Dr. K, though denying an "affair, admitted that he was even then maintaining a personal and romantic relationship with Patient A. Thus, in view of Dr. K's own admissions to at least maintaining a romantic relationship with Patient A, the alleged bias of Dr. K's wife is of little importance.

Under the circumstances of this case, we perceive no error in the Board's

undertaking the investigation based upon the information it had received, irrespective of whether the complaints themselves were initially based upon the hearsay information supplied by Dr. K's wife, when that information, for all intents and purposes, was validated by appellant.

We therefore hold that Patient A's constitutional right to privacy in her medical records pertaining to her treatment by Dr. K is outweighed by the State's compelling interest in obtaining those records for the purpose of

investigating the possible disciplinary action against Dr. K.

JUDGMENT AFFIRMED; COSTS

IN THE COURT OF APPEALS OF MARYLAND

DR. K., et al	:	Petition Docket No. 557
v.	:	September Term, 1993
STATE BOARD OF PHYSICIAN QUALITY ASSURANCE	:	(No. 138, Sept. Term 1993, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Judge Raker did not participate in the consideration of this case.

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Chief Judge

Date: March 9, 1994